

Roundup

An Update on Government Contracts Issues for Clients & Friends

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Postal Contracting

Goodbye Ombudsman! -- Hello Supplier Disagreement Resolution Official

By David P. Hendel

On November 14, 2007, the Postal Service revised its purchasing regulations – such as they are – to make a change concerning the office of the Ombudsman. The change stems from the findings in the GAO's report issued two years ago entitled: "U.S. Postal Service: Purchasing Changes Seem Promising, but Revisions to Ombudsman Position Are Needed." The GAO criticized the Ombudsman procedure on several grounds, including: (1) the Ombudsman is not independent of, or impartial from, the Supply Management organization; (2) the Ombudsman makes final, binding decisions instead of recommendations; and (3) the Ombudsman process does not promote confidentiality.

Instead of dealing with these issues, the Postal Service decided to change the name of the Ombudsman to the "Supplier Disagreement Resolution Official," or SDRO for short. Now, there will be no confusing the SDRO with the activities associated with an ombudsman.

SDRO Process

While we're on the subject, let's take a short refresher on the SDRO process. In the event a supplier has a "disagreement" concerning a procurement, the first step in the process is for the supplier to file an "initial disagreement" with the contracting officer. The initial disagreement must be in writing and must be filed within 10 calendar days of the date the supplier received notification of an award, or within 10 days after receiving a debriefing.

Once you file a timely "initial disagreement," the contracting officer has 10 calendar days

Please route this issue to:

- _____
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to resolve the matter. If the contracting officer denies your disagreement, you then have another ten calendar days from when you receive the denial to lodge a full-fledged "disagreement" with the SDRO. Keep in mind that if the contracting officer does not resolve the matter in ten calendar days, or takes longer than ten days to respond, you must make sure to lodge your disagreement within 20 calendar days from when you filed the initial disagreement.

Incidentally, the Postal Service has not modified its regulation stating that the SDRO's decision is final and unappealable to any court, absent fraud. As mentioned in previous articles, it is highly unlikely that this is indeed the case. By statute and case-law, courts have jurisdiction to hear protests over Postal Service procurements and no regulation the Postal Service issues on its own can overrule that. Court actions, however, are considerably more costly to prosecute than the SDRO process.

SDRO Sustains HCR Supplier's Disagreement

While the overall record of suppliers employing the SDRO process has not been good, from time to time a disagreement is sustained. In a November 9, 2007 decision, designated as Case No. OM07MT-10, the SDRO sustained a supplier's disagreement over the award of an Highway Contract Route (HCR) contract. The disagreement concerned the award of an HCR contract in Florida. JEM Transport, Inc., who brought the disagreement, submitted a bid that was \$254,581 lower than the awardee's bid. Over the four-year life of the contract, that worked out to a difference of more than \$1.1 million. The contracting officer awarded the contract to another contractor

because JEM had previously been terminated for default. JEM pointed out, however, that the awardee had also been terminated for default – and more recently than JEM.

In defending the award decision, the contracting officer stated: "A lower price is no bargain if the supplier's capability, as measured by how it has performed on comparable work in the recent past, has been deficient." But the SDRO noted that under the evaluation criteria set out in the solicitation, price factors were considered more important than performance evaluation factors. And since both JEM and the awardee had been terminated for default on previous contracts, the \$1.1 million price difference loomed as the deciding factor. The SDRO therefore found that the award decision was arbitrary and did not represent the best value to the Postal Service.

As a remedy, the SDRO decided that the contracting officer must terminate the contract for convenience on 60 days notice and resolicit the procurement. The remedy is disappointing. There is no reason for the parties to engage in further bidding in order to obtain the "best value" procurement. The problem here was that the contracting officer failed to evaluate proposals on the basis of the evaluation criteria set out in the solicitation. The appropriate corrective action, in these circumstances, would be to instruct the contracting officer to re-evaluate proposals on the basis set out in the solicitation. New proposals are not necessary for this purpose. Indeed, this is a case where the SDRO should have instructed the contracting officer to award the contract to JEM.

Who's a Local for Disaster Contracting? Recent GAO Decisions and Proposed Rule Restrict Definition

By J. Michael Littlejohn

Under the post-Hurricane Katrina changes to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 et seq., a federal agency can set aside or limit a disaster relief recovery contract award to a local firm. A "local firm" is defined by statute as one "residing or doing business primarily in the area affected by such major disaster or emergency." 42 U.S.C. § 5150(a)(1). The agency may set aside the award in accordance with that provision based on a "specific geographic area." 42 U.S.C. § 5150(a)(3). As seen in the recent GAO bid protests of Allied Barton Security Services, LLC, B-299978, Oct. 9, 2007, and Executive Protective Security Service, Inc. ("EPSS"), B-299954.3, Oct. 22, 2007, agencies (namely FEMA) have broad discretion in determining whether a firm is "local" and can compete for a contract. However, those determinations will be subject to review in GAO protests where GAO will help define the definition of "local" as FEMA deals with various factual scenarios. Moreover, based on proposed changes to the set-aside regulations issued after the two GAO decisions, it appears that the definition of "local" may be further restricted.

Both protests involved FEMA solicitations to obtain guard services for FEMA housing sites in certain locations: Baton Rouge, Louisiana for AlliedBarton and Mississippi for EPSS. The solicitations limited awardees to those firms residing in or primarily doing business each respective state. They incorporated the then-current version of FAR 52.226-3 which provides guidance on "whether a firm resides or primarily does business in the designated area." The FAR clause noted that the agency may consider several factors, including the location of the "firm's permanent office in the designated

area", "existing state licenses," past work in the area, relations with subcontractors in the area, "percentage of the firm's gross revenue attributable to work performed in the designated area," the number of permanent employees in the area, local organization membership, and "other evidence that establishes the firm resides or primarily does business in the designated area." FAR 52.226-3(c).

AlliedBarton, a firm incorporated in Delaware, with its principal place of business in Pennsylvania and its primary point of contact in Arlington, VA submitted a quote for the Louisiana business. It advised FEMA that it had longstanding ties in Louisiana that pre-dated Hurricane Katrina. It had worked there for 20 years, had a Louisiana office, and had appropriate Louisiana business licenses. This was not enough for FEMA. The agency determined that AlliedBarton was neither "residing" in nor "doing business primarily" in Louisiana. FEMA noted that the contractor's revenues from Louisiana were only 1% of its gross revenue, that its teaming agreement with a local firm did not guarantee that firm 50% of the work, and that its Louisiana office did not necessarily employ locals. Because it was clear that the firm did not do business "primarily" in Louisiana, FEMA rested its decision on a determination that it did not "reside" in Louisiana. The fact that its state of incorporation, headquarters, and primary points of contact were outside Louisiana were deciding factors. FEMA did not consider AlliedBarton local and excluded the firm from the competition. In the subsequent protest, the GAO found that FEMA's assessment was reasonable. GAO found FAR 52.226-3 to be a "non-exclusive" list of factors to consider that does not tell agencies how to weigh certain issues or

limit the agency's ability to look at other factors. Accordingly, GAO found it was proper for the agency to consider the vendor's state of incorporation, the location of its headquarters, and the location for its business point of contact in Virginia.

Executive Protective Security Service was on the other side of the fence in its protest. It alleged that the awardee, SCG, was a Tennessee corporation that should not have been considered a local Mississippi firm under the Stafford Act by FEMA. FEMA had concluded that SCG did not "reside" in Mississippi, but that it met the alternative test of "primarily doing business" in the state because 24% of its gross revenue came from work performed in the state. That represented the single largest source of revenue for the company. GAO found that the agency's logic was unreasonable. It did not make sense that a firm with less than half of its revenue from one state could be said to "primarily" do business in that state. Without guidance in the statute or regulations, GAO looked to the ordinary meaning of the words "doing business primarily" and found that it must mean "majority" of its work. GAO noted that FEMA's illogical approach would allow a company that had 2% of its work coming from one state and 98% from all other sources to qualify as a local firm. That could not have been the intent of Congress in trying to ensure the use of local firms and people. GAO pointed to the committee report on the Stafford Act expressing the intent that a "Federal assistance program should be designed to revitalize the community by infusions of case through the use of local people and business firms." *Id.* at 8 (citing S. Rep. No. 91-1157, at 12 (1970)). According to GAO, SCG did not have a connection to Mississippi to qualify it as a local firm; it made a "business decision not to concentrate its work in any one particular state, but instead broadly diversifying the geographic locations in which it does work." *Id.* at 9. Thus, while it might be a good, safe business practice to

diversify, that choice made the company ineligible for the work under the Stafford Act.

On November 7, 2007, the FAR Councils issued an interim change to the local set-aside rule that appears to further restrict the definition of "local." The interim rule changes FAR 52.226-3 to limit the initial determination of "local" to a review of the location and revenues of the offeror's offices in the set-aside areas to the last 12 months. In that regard, the new rule at FAR 52.226-3(c) states:

An offeror is considered to be residing or primarily doing business in the set-aside area, if, during the last twelve months –

- (1) The offeror had its main operating office in the area; and
- (2) That office generated at least half of the offeror's gross revenues and employed at least half of the offeror's permanent employees.

If the offeror does not meet this test, the contracting officer may still determine that the offeror is "local" using the same factors that were in the original rule (with some minor changes to wording). Those factors are listed (at FAR 52.226-3(d)) as the following:

- 1) Physical location(s) of the offeror's permanent office(s) and date any office in the set-aside area(s) was established;
- 2) Current state licenses;
- 3) Record of past work in the set-aside area(s) (e.g., how much and for how long);
- 4) Contractual history the offeror has had with subcontractors and/or suppliers in the set-aside area;
- 5) Percentage of the offeror's gross revenues attributable to work performed in the set-aside area;

- 6) Number of permanent employees the offeror employs in the set-aside area;
- (7) Membership in local and state organizations in the set-aside area; and
- (8) Other evidence that establishes the offeror resides or primarily does business in the set-aside area. For example, sole proprietorships may submit utility bills and bank statements.

Given the previous decisions by GAO on these factors, it is questionable whether the CO would be able to determine that a firm that did not qualify under the first set of tests could qualify under the "other factors" test. In AlliedBarton, GAO found that a firm did not meet the "residing" test when its state of incorporation, location of headquarters, and business point of contact were out of the area, even though it had longstanding ties in the area, it had an area office, and local business licenses. And, in Executive Protective Security Service, the GAO found that the "doing business primarily" test using the factors was only

met when the firm did a "majority" of its work in the area. None of the other factors overcame that issue. The interim FAR rule appears to support the GAO approach. In fact, the FAR Councils noted that the determination of whether an offeror is local could not be based solely on the presence of a "branch office" in the area. It noted that the "intent of Congress was to favor firms in the local area who hire local people. A local branch office is local and hires local people, but the contract would not be restricted to the branch office, because the branch office is not the contracting entity." 72 Fed. Reg. 63084 (Nov. 7, 2007).

The GAO cases and the new FAR rule on local set-asides under the Stafford Act raise many questions for debris removal and disaster recovery contractors. Comments on the interim rule are due on January 7, 2008. Contractors of all sizes should be interested in commenting on the new rule to ensure that the intent of Congress is carried out without unduly restricting the number of firms that can participate in local set-aside disaster procurements.

Organizational Conflicts of Interest: Subcontractor's Ownership Creates OCI

By Daniel J. Donohue

A November 2, 2007 GAO bid protest decision provides a good opportunity to review organizational conflicts of interest (OCI's) and the potential consequences of not identifying them early. VRC, Inc., B-310100, also reaches an unlikely result – that an existing subcontractor of an incumbent prime contractor created an OCI that disqualified the incumbent prime from competing for the follow-on contract.

VRC was the incumbent contractor that provided personnel services to the National Guard Bureau in support of the Joint Combined State Strategic Plan. VRC had a

subcontractor named Military Personnel Services Corporation (MPSC). One of the owners of MPSC was a company named Taylor Consultants, Inc. (TCI). The TCI company also had a direct contract with the National Guard to assist the Guard in procurements. One of TCI's employees was to help the National Guard procure the follow-on contract for the work VRC was performing under its incumbent contract. The TCI employee was to have access to the source selection plan and was to help members of the Source Selection Board evaluate competing proposals. Thus, TCI, the owner of VRC's subcontractor, was to

help evaluate proposals for the contract for which VRC was competing.

An early amendment to the solicitation for the follow-on contract expressly stated that TCI employees would advise the Source Selection Board for the follow-on contract and expressly prohibited "such firms" from competing for the follow-on contract. The solicitation amendment said:

Offerors are advised that employees of the firm identified below may serve as advisors to Source Selection Evaluation Board members in the source selection process. These individuals will be authorized access to only those portions of the proposal data and discussions that are necessary to enable them to perform their respective duties. Such firms are expressly prohibited from competing on the subject acquisition and from rating proposals or recommending a selection.

Firm: Taylor Consultants, Inc.

Contact Name: [name of the TCI employee]

After the solicitation was issued and prior to receipt of offers, the National Guard's Chief of the Operational Contracting Division, who worked with VRC on the incumbent contract, recused himself from participating in the source selection for the follow-on contract. Five proposals were submitted. VRC's proposal included MPSC, whose owner TCI was helping the National Guard evaluate proposals.

It appears that the National Guard contracting officer learned of the relationship among VRC, MPSC and TCI only after proposals were received but prior to award. The contracting officer gave VRC written notice that he was considering rejecting VRC's proposal because of an OCI. The contracting officer deemed VRC's

written response inadequate, rejected VRC's proposal and VRC protested to GAO.

VRC claimed that, prior to the Chief's recusal, the Chief expressed his opinion that the relationship among VRC, MPSC and TCI did not create an OCI and that the Chief "approved TCI's measures designed to mitigate any perceived conflict." Unfortunately for VRC, the Chief did not support VRC's position. He testified by Declaration that he never saw a mitigation plan and did not recall approving one. VRC did not produce a written mitigation plan to GAO. GAO denied VRC's protest, holding that the contracting officer did not act unreasonably in rejecting VRC's proposal.

FAR Section 9.5 discusses OCI's, the contracting officer's duties in connection with them and the contracting officer's discretion in resolving or mitigating OCI's. GAO's decision states that OCI's can be categorized into three groups: "unequal access to information" cases; "biased ground rules" cases; and "impaired objectivity" cases. See Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12-13. VRC's protest concerned an "unequal access to information" OCI because TCI's employee helped evaluate proposals and VRC's subcontractor MPC was related to TCI by common ownership.

Citing CACI, Inc.-Fed. v. United States, 719 F.2d 1567 (Fed.Cir. 1983), in which the Federal Circuit reversed the Claims Court's finding of an OCI based solely on an appearance of impropriety, GAO stated that a proposal cannot be rejected merely on an appearance of impropriety. Rather, a finding of an OCI must be based on facts, not appearances. But once the facts establish an OCI, GAO held that the contracting officer's decisions about the impact of the OCI and means to address that impact need not be based on facts, but

are matters left to the contracting officer's discretion to address, mitigate or resolve.

GAO also held that, once an OCI is established by the facts, the contracting officer may presume that harm will result from the OCI. That is, the contracting officer need not produce hard facts showing that the OCI in fact gave VRC an unfair competitive advantage or provided it with access to source selection information. The contracting officer may presume that, and was not required to prove it to justify rejection of VRC's proposal. GAO's decision upholding the contracting officer's rejection of VRC's proposal stated:

The protester also asserts that there was no conflict of interest because the agency has not shown "hard facts," that is, that VRC was in possession of source selection information as a result of the TCI's employee's work for the agency. We disagree. It is true that a determination to exclude an offeror must be based on facts, rather than mere suspicion. (citations omitted.) The facts that are required, however, are those which establish the existence of the OCI, not the specific impact of the conflict. (citation omitted.) Once the facts establishing the existence of an OCI are present, reasonable steps to avoid, mitigate, or neutralize the conflict are required without further need for "hard facts" to prove the conflict's impact on the competition. Where, as here, the facts demonstrate that an OCI exists, the harm from that conflict, unless it is avoided or adequately mitigated, is presumed to occur. (Emphasis added.)

So GAO denied VRC's protest and upheld the contracting officer's rejection of VRC's proposal.

Is it fair to VRC to exclude it from the competition based solely on the ownership and activities of its subcontractor? Is it fair to VRC to exclude it from the competition because harm is assumed to occur without requiring the contracting officer to justify rejection of VRC's proposal by showing that VRC in fact obtained an advantage or source selection information? It appears that GAO's decision reaches a practical solution, at least for OCI's involving "unequal access to information." The relevant facts probably would be within the exclusive knowledge of the offeror, thus precluding the contracting officer from developing facts on which to base a decision.

Could this result could have been avoided had VRC identified the potential OCI early in the procurement? Perhaps. Under FAR 9.504, the contracting officer has discretion to adopt a means of mitigating the OCI short of excluding VRC, although he or she would not have been required to allow VRC to compete. GAO's description of the facts implies that VRC either made half-hearted efforts to address this potential OCI or that it made no effort at all to address it and just hoped it would not come to light. Either way, VRC's actions put the National Guard officials in a position where they had to address the problem at the eleventh hour - after proposals were received and were being evaluated. That appears to have been unwise in hindsight.

Perhaps the lesson from this decision is that all members of a proposal team – prime and subs – need information and representations from each other about potential OCI's so that the team can identify potential OCI's and consider bringing them to the contracting officer's attention in writing so that the team may have an opportunity to avoid or mitigate an OCI. Teaming agreements can and should address potential OCI's and may provide means of avoiding or mitigating them should they arise.

FAR Councils Issue SAFETY Act Interim Contracting Rule

By J. Michael Littlejohn

On November 7, 2007, the FAR Councils issued the long-awaited FAR Rule to incorporate the SAFETY Act into federal procurements. Comments are due by January 7, 2008. A few highlights of the interim rule, effective as of November 7, are the following:

- * Part 50 is split into Subpart 50.1 (85-804 relief) and Subpart 50.2 (SAFETY Act);
- * FAR 50.000(a)(2) acknowledges that the indemnification authority of Pub.L. 85-804 is available in contracting actions that involve the SAFETY Act.
- * FAR 50.204(c) requires agencies to determine in acquisition planning stages whether the procurement can be covered by the SAFETY Act, and requires the agency to consult with DHS.

The interim rule directs agencies to include one of following provisions in each contract. One of the main points of the clauses is whether a contractor will be able to submit offers that are priced contingent upon SAFETY Act coverage.

FAR 52.250-2 SAFETY Act Coverage Not Applicable – This clause will be used when the agency consulted with DHS and decided coverage was not applicable. This clause provides that proposals made in which pricing is contingent on SAFETY Act coverage of product will not be considered for award.

FAR 52.250-3 SAFETY Act Block Designation/Certification – This clause will be used when the DHS has issued a block designation for the procurement. This clause notifies contractors that a block designation has been granted, but gives contractors the choice to apply for coverage. It states that proposals in which pricing is contingent on SAFETY Act coverage will not be considered for award.

FAR 52.230-3(ALT I) SAFETY Act Block Designation/Certification (Alternate I) - The alternate clause allows an offer to be submitted contingent on SAFETY Act approval. The offeror may also submit an offer without the contingency. The Government can make award on the contingent offer only after DHS issues a designation before award. The Government reserves the right to make the award before the designation is issued, meaning, most likely that the Government will be able to make an award to another offeror or on the non-contingent offer without having to wait for a final DHS decision.

FAR 52.250-4 SAFETY Act Pre-Qualification Designation Notice - The contracting officer can use this clause where the agency is presuming that DHS will approve the technology for SAFETY Act coverage. The clause includes an Alternate II which provides that offerors can submit proposals "presuming" coverage. The offeror will be eligible for award only if it applies for SAFETY Act coverage, pursues the coverage in good faith, and agrees to obtain the insurance required by DHS. If DHS does not approve the technology before award, then the contracting officer will include the equitable adjustment clause in the contract.

FAR 52.250-5 SAFETY Act Equitable Adjustment - This clause allows an equitable adjustment where the prices in the contract were established presuming that DHS would grant SAFETY Act coverage. To obtain the equitable adjustment, the contractor must pursue SAFETY Act

coverage and insurance in "good faith." The CO has the following options under the clause: 1) adjust the contract for the "resulting increase or decrease in the contractor's costs" or adjust other terms and conditions or 2) terminate the contract for convenience. 52.250-4(d)(2). A disagreement over the adjustment is a Dispute under the Disputes clause and the contractor has the obligation to keep performing "during establishment of any equitable adjustment." 52.250-4(d)(3), (4).

The interim rule raises many questions about including the SAFETY Act in federal procurements, both from a practical and legal sense. For instance, will DHS be able to process all of the requests for consultation from agencies on whether the SAFETY Act should apply in a timely fashion? How will CO's decide the "increase or decrease in the contractor's costs" under the equitable adjustment provisions? We will continue to follow developments on this interim rule.

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